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NTSB Order No. EA-5321

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 25th day of September, 2007

_____)	
ROBERT A. STURGELL,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-17823
v.)	
)	
MICHAEL J. SCUDERI,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

Respondent appeals the oral initial decision of Chief Administrative Law Judge William E. Fowler, Jr., issued December 6, 2006.¹ The law judge affirmed, in part, the Administrator's complaint, which had ordered a suspension of

¹ A copy of the initial decision, an excerpt from the hearing transcript, is attached.

respondent's commercial pilot certificate, based on alleged violations of 14 C.F.R. §§ 61.3(c)(1),² 61.51(i)(1),³ 91.111(a),⁴ 91.13(a) and (b),⁵ 91.405(a),⁶ and 91.7(a).⁷ The law judge reduced the Administrator's sanction of 180 days to 100 days,

² Section 61.3(c)(1) provides as follows:

[A] person may not act as pilot in command or in any other capacity as a required pilot flight crewmember of an aircraft, under a certificate issued to that person under this part, unless that person has a current and appropriate medical certificate that has been issued under part 67 of this chapter, or other documentation acceptable to the Administrator, which is in that person's physical possession or readily accessible in the aircraft.

³ Section 61.51(i)(1) provides that, "[p]ersons must present their pilot certificate, medical certificate, logbook, or any other record required by this part for inspection upon a reasonable request by—(i) The Administrator; (ii) An authorized representative from the National Transportation Safety Board; or (iii) Any Federal, State, or local law enforcement officer."

⁴ Section 91.111(a) prohibits airmen from operating an aircraft so close to another aircraft as to create a collision hazard.

⁵ Section 91.13(a) prohibits operation of an aircraft in a careless or reckless manner so as to endanger the life or property of another. Subsection (b) provides that no person may operate an aircraft on the surface of an airport used by aircraft for air commerce in a careless or reckless manner.

⁶ Section 91.405(a) requires each owner or operator of an aircraft to have the aircraft inspected and have discrepancies repaired in accordance with part 43 of the Federal Aviation Regulations.

⁷ Section 91.7(a) prohibits operation of a civil aircraft unless it is in an airworthy condition.

based on a finding that the Administrator had not proved one alleged regulatory violation. We deny respondent's appeal.

The Administrator's order, dated August 21, 2006, functions as the complaint against respondent, and alleges that respondent operated a Cessna 182 aircraft on January 21, 2006, at Orange County Airport in Montgomery, New York, and that the wingtip of his aircraft struck the wingtip of a Beechcraft King Air, causing damage to both aircraft. The Administrator alleged that respondent operated his aircraft so close to the other aircraft that it created a collision hazard, and that he operated his aircraft in a careless and reckless manner. The Administrator also alleged that respondent departed from Orange County Airport without first taking corrective action, inspecting, or repairing his aircraft. Finally, the Administrator alleged that respondent operated the aircraft as pilot-in-command while he did not have a current medical certificate, and that he failed to present his pilot certificate, medical certificate, logbook, and other items in response to a reasonable request from a State or local law enforcement officer.

The law judge held an evidentiary hearing on December 6, 2006. The Administrator presented the testimony of Anastasia P. Vournas, who co-owns the King Air with her husband. Ms. Vournas testified that she was in the King Air when the collision

occurred (Tr. at 17, 29), and that respondent apologized to her and her husband after the collision occurred (Tr. at 20).

The Administrator also called New York State Trooper Robert Kreppein, the chief pilot for the Aviation Unit of the New York State Police. Tr. at 44. Mr. Kreppein testified that he saw the King Air "lurch backwards" as a result of the collision, and that he heard the noise of the collision. Tr. at 49, 73. Mr. Kreppein stated that he approached respondent immediately after the collision and asked to see respondent's airman and medical certificates, and his driver's license, and that respondent replied that he did not have those items with him. Tr. at 52. Mr. Kreppein also testified that he observed damage on the King Air and the Cessna. Tr. at 54.

The Administrator also called Mr. Jeffrey Allen Shapiro, an aviation safety inspector at the Flight Standards District Office in Teterboro, New Jersey, who holds an airframe and powerplant certificate, with inspection authorization. Tr. at 95. Mr. Shapiro testified that he received notification of the collision and went to the Orange County Airport, but that when he arrived, respondent had already departed. Tr. at 101-102. Mr. Shapiro opined that, given the circumstances of the collision, respondent should have arranged for an internal, complete inspection of the aircraft before operating it again.

Tr. at 104. Mr. Shapiro testified that respondent's mechanic's subsequent inspection, in which the mechanic certified the aircraft as airworthy, does not render respondent any less culpable, because he took off in the aircraft when it was "in an unknown" condition. Tr. at 109.

Respondent provided the testimony of Peter Vajsabel, who inspected respondent's aircraft 2 days after the collision. Tr. at 148. Mr. Vajsabel recalled that respondent contacted him and asked him to inspect the aircraft, because he had been involved in an incident. Tr. at 148. Mr. Vajsabel testified that he inspected the aircraft, and did not recall that the glare shield was "that bent." Tr. at 149, 153. Mr. Vajsabel certified the aircraft as airworthy. Exh. R-1; Tr. at 153. Respondent also presented the testimony of Marc Levitt, who was accompanying respondent on the flight in question. Tr. at 163. Mr. Levitt testified that the weather on the day of the collision was clear, but very windy, and that respondent operated the aircraft in a zigzag pattern when trying to park it. Tr. at 166-67, 169. Mr. Levitt stated that he did not feel the impact of the collision, but that respondent told Mr. Levitt that he thought that he had "scraped [the] wing" of the King Air. Tr. at 170-71. Mr. Levitt also testified that respondent could not find his wallet when Mr. Kreppein asked respondent to provide his

certificates and driver's license, but that respondent found his wallet in the aircraft later. Tr. at 176.

Respondent also testified on his own behalf, and stated that a gust of wind caused him to accelerate the aircraft past the center point of the taxiway. Tr. at 204, 244, 250. Respondent asserted that the underside of the glare shield grazed about "4 inches inboard on the boot" of the wing, and the displacement that this bending caused was nominal. See Tr. at 205-206, 250. Respondent said that he re-bent the glare shield with his fingers (Tr. at 210-11), and understood from Mr. Krepplein that he was free to leave, even though an FAA employee had not yet arrived. Tr. at 212-13. Respondent stated that he contacted his mechanic for an inspection of the aircraft the following Monday, which showed that the aircraft was airworthy. Tr. at 216, 219. Respondent also acknowledged that he told Mr. Krepplein that he did not believe he had his medical and pilot's certificates with him. Tr. at 208. Finally, respondent testified that he filed a report in accordance with the Aviation Safety Reporting Program (ASRP), but never received a return slip from the National Aeronautics and Space Administration (NASA); he said, however, that NASA sent an acknowledgement letter to him recognizing that he had reported the incident. Tr. at 223-25; Exh. R-3.

The law judge found that the Administrator had proved each of the regulatory violations charged, with the exception of 14 C.F.R. § 91.405(a), and ordered a 100-day suspension of respondent's commercial pilot certificate. Initial Decision at 287-88. The law judge based his conclusions largely on credibility determinations, finding that Mr. Krepplein's testimony established that respondent collided with the King Air, causing damage to both aircraft. Id. at 284. The law judge concluded that respondent experienced a lapse in judgment when he failed to have the aircraft inspected before operating it again, and that his operation of the aircraft after the collision rendered him in violation of the Federal Aviation Regulations. Id. at 284-85. The law judge also concluded that respondent had not provided sufficient evidence to show that he was eligible for a waiver of sanction under the ASRP,⁸ but stated

⁸ The ASRP allows for a waiver of sanction, despite the finding of a regulatory violation, if the party filing the report meets certain other requirements. Aviation Safety Reporting Program, Advisory Circular 00-46D at ¶ 9c (Feb. 26, 1997). The filing of a report may obviate the imposition of a sanction where: (1) the violation was inadvertent and not deliberate; (2) the violation did not involve a criminal offense, accident, or action found at 49 U.S.C. § 44709; (3) the person has not been found in any prior FAA enforcement action to have committed a regulatory violation for the past 5 years; and (4) the person completes and mails a written report of the incident to NASA within 10 days of the violation. Id.

that he considered respondent's argument that he had reported the incident. Id. at 285.

On appeal, respondent asserts that the law judge erred in concluding that respondent had operated the aircraft when it was unairworthy. Specifically, respondent argues that the Administrator based the case on the testimony of Mr. Shapiro, whose testimony was not persuasive. Respondent points out that Mr. Shapiro described the damage as a "scuff," that Mr. Krepplein testified that he did not see any damage to the aircraft, that Mr. Vajsabel certified the aircraft as airworthy shortly after the incident, and that the photograph on which the Administrator relied does not show damage that would render the aircraft unairworthy. Overall, respondent mainly contests the law judge's conclusion with regard to the § 91.7(a) violation.⁹ Respondent also disputes the law judge's imposition of sanction, arguing that a 100-day suspension is inappropriate, and that respondent is subject to a waiver of sanction under the ASRP.

⁹ Respondent recognizes that the law judge's conclusions rested largely on credibility findings, and acknowledges that the Board will not reverse such findings unless they are arbitrary, capricious, or not otherwise in accordance with the law. Respondent's Br. at 6.

The Administrator contests each of respondent's arguments, and urges us to affirm the law judge's decision.¹⁰

In reviewing the law judge's decision and considering respondent's appeal, we are mindful of the fact that the Administrator has the burden of proving that the aircraft was unairworthy by a preponderance of the evidence.¹¹ In cases in which the Administrator alleges that an operator has violated 14 C.F.R. § 91.7(a), we have long held that the standard for airworthiness consists of two prongs: (1) whether the aircraft conforms to its type certificate and applicable Airworthiness Directives; and (2) whether the aircraft is in a condition for safe operation.¹² We have recognized that, "the term 'airworthiness' is not synonymous with flyability."¹³ In determining whether an aircraft is airworthy in accordance with the aforementioned standard, the Board considers whether the

¹⁰ The Administrator does not contest the reduction in sanction.

¹¹ Administrator v. Van Der Horst, NTSB Order No. EA-5179 at 3 (2005); see also Administrator v. Schwandt, NTSB Order No. EA-5226 at 2 (2006) (it is the Board's role to determine, after reviewing the evidence the Administrator presents, whether the Administrator has met the requisite burden of proof).

¹² Administrator v. Doppes, 5 NTSB 50, 52 n.6 (1985) (citing 49 U.S.C. § 1423(c)); see also Administrator v. Anderson, NTSB Order No. EA-3976 at 2 (1993); Administrator v. Nielsen, NTSB Order No. EA-3755 at 4 (1992); Administrator v. Copsey, 7 NTSB 1316, 1317 (1991).

¹³ Doppes, supra note 12, at 52 n.6.

operator knew or should have known of any deviation in the aircraft's conformance with its type certificate.¹⁴

In applying the Doppes two-prong standard, we conclude that, while the Administrator has not presented evidence to prove that respondent's aircraft did not conform to its type certificate, the Administrator has nevertheless shown that the aircraft was not in a condition for safe operation when respondent operated the aircraft. Mr. Shapiro's testimony indicated that the aircraft was not in a condition for safe operation. Tr. at 104-105. In addition, the Administrator has established that respondent knew of the aircraft's condition of questionable airworthiness. Respondent does not dispute that he was aware of the bent glare shield, and acknowledges that he bent it back before departing. Tr. at 205, 210-11. Respondent also asked Mr. Vajsabel to inspect the aircraft as soon as possible after the collision. Tr. at 216. Respondent's awareness of the potentially unsafe condition leads us to

¹⁴ See, e.g., Administrator v. Yialamas, NTSB Order No. EA-5111 (2004); Administrator v. Bernstein, NTSB Order No. EA-4120 at 5 (1994); see also Administrator v. Easton, NTSB Order No. EA-4732 at 2 (1998) (acknowledging that significant risks exist when a pilot fails to confirm that an aircraft is airworthy following maintenance).

conclude that his operation of the aircraft resulted in a violation of § 91.7(a).¹⁵

Based on our conclusion that the Administrator has established the § 91.7(a) violation, we also conclude that respondent's operation of the aircraft subsequent to the collision was careless and reckless, in violation of § 91.13. Likewise, the Administrator has also established that respondent violated § 91.111(a), in that he operated his aircraft within such close proximity to the King Air as to cause a collision hazard. We also agree with the law judge's conclusions concerning violations of §§ 61.3(c)(1) and 61.51(i)(1): respondent acknowledges that he did not present his certificates upon request (Tr. at 208), and does not dispute that Mr. Kreppein is a New York law enforcement official (see Tr. at 44). Respondent has not established that the law judge erred in concluding that he violated §§ 91.7(a), 91.13, 91.111(a), 61.3(c)(1), and 61.51(i)(1).

Respondent also disputes the law judge's imposition of a 100-day sanction. Although the circumstances of respondent's ASRP report are unusual, we defer to the law judge's factual finding with regard to the alleged report. Moreover, we note

¹⁵ Cf. Administrator v. Thibert, NTSB Order No. EA-5306 (2007) (Administrator did not prove that respondent knew or should have known of an alleged discrepancy).

that respondent has not established that he meets the other criteria of the ASRP, in that he has not shown that his violations were inadvertent. Overall, we find that respondent has not established that he is eligible for a sanction waiver under the ASRP. In addition, respondent argues that a suspension period of 100 days is unreasonable, and that we have imposed shorter suspension periods in other cases in which we have found a violation of § 91.7(a). We disagree with respondent's argument, given that we have concluded that the Administrator has proved the other regulatory violations, in addition to § 91.7(a). As such, the law judge did not err in imposing a suspension of respondent's certificate for a period of 100 days.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The law judge's initial decision, including the reduction in sanction from 180 to 100 days, is affirmed; and
3. The 100-day suspension of respondent's commercial pilot certificate shall begin 30 days after the service date indicated on this opinion and order.¹⁶

¹⁶ For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. § 61.19(g).

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN, HIGGINS, and CHEALANDER, Members of the Board, concurred in the above opinion and order.